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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE LIGON NAVARRO, Defendant and Appellant.	B211266 (Los Angeles County Super. Ct. No. NA078574)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Pierce, Judge. Affirmed with directions.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

Lawrence Ligon Navarro challenges his conviction for possession of methamphetamine. His sole contention is that the admission of testimony based on a forensic laboratory report prepared by a nontestifying analyst violated his Sixth Amendment right to confrontation. We find no prejudicial error and affirm.

PROCEDURAL BACKGROUND

Navarro was charged with one count of possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). It was alleged that he suffered a prior conviction within the meaning of the "Three Strikes" law (Pen. Code,[1] §§ 1170.12, subds (a)-(d), 667, subds. (b)-(i)), and a prior prison term enhancement within the meaning of section 667.5.

The jury found Navarro guilty of possession of methamphetamine. Navarro admitted that he suffered a prior conviction for criminal threats (§ 422) and that he served a prior prison term (§ 667.5, subd. (b)).

The court sentenced Navarro to prison for two years and doubled the sentence because of the admitted prior strike conviction. Navarro timely appealed.

FACTUAL BACKGROUND

On June 4, 2008, Officer Jonathan Calvert observed Navarro with an ashen and pimply complexion, characteristics consistent with heavy methamphetamine use. Calvert asked Navarro when he had last used "tic-tic," a slang term for methamphetamine, and whether Navarro had any in the house. Navarro responded that it had been "a while" since he used methamphetamine, and that he did not have any in the house because he had "smoked it all."

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[1] Undesignated statutory citations are to the Penal Code.

Inside a dresser drawer in Navarro's bedroom, Calvert found two pipes used to smoke methamphetamine and approximately three dozen empty baggies with fine crystalline powder residue. Calvert also discovered a small baggie with a "usable-size shard" of a substance Calvert recognized as crystal methamphetamine. Calvert opined that the amount of methamphetamine was usable, having previously learned that from that amount one could "get quite a few good hits off of that and get . . . high." The most common way to use the methamphetamine is by smoking it in a pipe like the pipes Calvert found in Navarro's dresser.

Criminalist Sarah B. Laramie tested the substance Calvert identified as methamphetamine. Her results showed the shard consisted of 0.03 grams of methamphetamine. Laramie took notes and wrote a report documenting the results of several tests she conducted to identify the chemical nature of the shard Calvert found in Navarro's dresser. Illness prevented Laramie from testifying at trial.

Criminalist Gregory Gossage, a colleague of Laramie's, reviewed her report, notes and test data, and testified in Navarro's trial. Gossage, who had conducted approximately 5,000 similar tests, described the various tests conducted by Laramie. Based on his review of Laramie's report and test data, Gossage opined that the shard found in Navarro's dresser was methamphetamine. On cross-examination, Gossage acknowledged that he did not conduct the actual testing of the substance. Following Gossage's testimony, Laramie's report was admitted into evidence.

Navarro's younger brother, Shann, testified for the defense.[2] Shann was aware that Navarro smoked narcotics. On June 4, 2008, Shann was staying in

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[2] Because they have the same last name, we refer to defendant's brother as Shann. All references to Navarro are to defendant Lawrence Navarro.

Navarro's apartment. Just before officers searched Navarro's apartment, Shann was arrested when officers found methamphetamine and a pipe in Shann's pocket. Shann testified that he told the police that the empty bags and pipe from Navarro's dresser belonged to him (Shann). He further explained that the empty baggies were left from previous times he had smoked methamphetamine. Shann initially testified the shard in Navarro's dresser belonged to him but later testified it did not belong to him.

DISCUSSION

Navarro argues that his Sixth Amendment right to confrontation was violated by admission of testimony based on laboratory reports prepared by a nontestifying declarant. The Attorney General argues the minute order and abstract of judgment must be amended to include fees imposed by the trial court.

1. *Assuming the Admission of Gossage's Testimony and Laramie's Report Violated the Confrontation Clause, the Error Was Harmless*

The "Confrontation Clause" provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] (U.S. Const., 6th Amend.) In its landmark decision, *Crawford v. Washington*

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[3] In a footnote, respondent argues that Navarro forfeited his Confrontation Clause challenge by failing to raise it below. Trial in this case took place in September 2008. At the time, *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) compelled the conclusion that the evidence regarding the results of Laramie's testing was admissible even though another analyst testified regarding the contents of her report. The trial court was required to follow *Geier*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Therefore, any objection defense counsel might have made based on the Confrontation Clause would have been futile. Accordingly, Navarro's challenge was not forfeited. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

(2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court concluded that the Confrontation Clause does not allow "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id*. at pp. 53-54, 68.) *Crawford* declined to define "testimonial," but held that, at a minimum, testimonial statements included prior testimony at a preliminary hearing, before a grand jury, at a former trial, and during police interrogations. (*Id*. at p. 68.)

Applying *Crawford*, the California Supreme Court held that evidence of DNA analysis testified to by a laboratory director after reviewing notes and a report of a laboratory technician was not testimonial evidence. (*Geier, supra,* 41 Cal.4th at p. 605.) Our high court emphasized that the report was generated as part of a "standardized scientific protocol" and was made as part of the scope of employment, not as an effort to incriminate the defendant. (*Id*. at p. 607.) Importantly, the opinions linking the defendant's DNA to the victim "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness . . . ." (*Id.* at p. 607.)

Subsequently, the United States Supreme Court considered whether the admission of affidavits reporting the results of forensic analysis violated the Confrontation Clause. (*Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*).) At issue were three "'certificates of analysis'" showing that seized bags contained cocaine and reporting the weight of the bags. (*Id*. at p. 2531.) The certificates were sworn to before a notary public. (*Id*. at p. 2531.) Five justices concluded that under *Crawford*, "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner

was entitled to '"be confronted with"' the analysts at trial." (*Melendez-Diaz,* at p. 2532.)

Justice Thomas joined the opinion only "because the documents at issue in this case 'are quite plainly affidavits,' [and] [a]s such they 'fall within the core class of testimonial statements' governed by the Confrontation Clause." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Justice Thomas "adhere[d] to [his] position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[4] (*Id.* at p. 2543.)

Under *Melendez-Diaz*, the introduction of Gossage's testimony and Laramie's report raises significant constitutional questions. However, we need not decide the precise scope of *Melendez- Diaz* because assuming the admission of the evidence was error, it was harmless.

Confrontation Clause violations are evaluated under the federal harmless-error analysis. (*Geier, supra*, 41 Cal.4th at p. 608.) "'[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.'" (*Ibid*.) Here, the defense did not dispute that the shard found in

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[4] Four dissenting justices concluded that *Crawford* should be limited to witnesses who have "personal knowledge of some aspect of the defendant's guilt . . . ." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2543 (dis. opn of Kennedy, J.).) "Laboratory analysts are not 'witnesses against' the defendant as those words would have been understood at the framing." (*Id.* at pp. 2550-2551.) "Instead, the Clause refers to a conventional 'witness' -- meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant's guilt." (*Id.* at p. 2551.)

Navarro's dresser was methamphetamine. The sole issue was whether Navarro possessed it. Defense counsel argued that "the issue is . . . really. . . about possession. Did Lawrence Navarro have possession of that small baggie of methamphetamine?" Defense counsel argued that the methamphetamine belonged to Navarro's brother Shann, and that Navarro was unaware of it.

Moreover, aside from Gossage's testimony and Laramie's report that the scientific testing showed the shard to contain methamphetamine, there was overwhelming, undisputed evidence that the shard, located near other narcotic paraphernalia, contained a controlled substance. (*People v. Garringer* (1975) 48 Cal.App.3d 827, 835 [specific nature of controlled substance not an element of charge of possession of controlled substance].) A defendant's knowledge of a substance's narcotic nature may be shown by familiarity with the substance or other physical manifestations of drug use or instances of prior use. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956; see also *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [elements of possession of controlled substance may be satisfied circumstantially]; cf. *Melendez-Diaz, supra*, 129 S.Ct. at p. 2542, fn. 14 [Confrontation Clause analysis "in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction"].) The substance was found with pipes commonly used to smoke methamphetamine. Officer Calvert recognized the substance as crystal methamphetamine. Navarro said that he had smoked all the methamphetamine he had in his house, indicating he had smoked methamphetamine in the past. Shann testified that the empty bags previously contained methamphetamine and that Navarro used methamphetamine. Because there was no dispute as to the narcotic nature of the substance, and because Navarro's counsel conceded that the sole issue was whether Navarro possessed it,

any error in the admission of Gossage's testimony or Laramie's report showing the substance to contain methamphetamine was harmless beyond a reasonable doubt.

2. The Minute Order and Abstract of Judgment Must Be Corrected

Respondent argues that the minute order fails to include the $20 court security fee and $50 laboratory fee, and that the abstract of judgment fails to include the laboratory fee. Those fees were imposed at the sentencing hearing and the clerical error in failing to document them should be corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

DISPOSITION

The judgment is affirmed. The case is remanded to the trial court to correct its minute order and the abstract of judgment and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.